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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-11

ROOSEVELT F. PALMORE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

I.

Glossing over the Congressional purpose underlying the "national"-"local" division of jurisdiction among the reorganized courts sitting in the District of Columbia

(Br.[1] at 16-17), the Government argues for a "plain language" construction of 28 U.S.C. §1257. The strained and quite unreasonable result of the Government's reading of the statute[2] is ample reason for this Court not to depart from the construction which it placed on a similar enactment fifty years ago in *Balzac v. Porto Rico*, 258 U.S. 298.[3] *Balzac* is not properly distinguished by the fact that the local legislature, as opposed to the Congress, enacted the statute there in issue. *District of*

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[1]The abbreviation "Br." refers to the Brief for Appellant; "Gov't Br." refers to the Brief for the United States.

[2]The Government suggests that Congress, by making Section 1257(2) applicable to appeals from the District of Columbia Court of Appeals, intended to exclude cases such as this one involving a constitutional attack on a local statute but to include that rare case such as *Young v. Masci*, 289 U.S. 253, where, by application of its conflict of laws principles, the Court of Appeals has passed upon the constitutional validity of a statute of a state in the course of a civil proceeding. The Government suggests no reason why Congress would have intended such an odd result, and we can think of none. More importantly, if the situation presented in *Young* arose again, we would think it appropriate to reconsider the *sub silentio* conclusion reached in that case and entertain appeals involving constitutional challenges to state statutes pursuant to Section 1257(2) only where there has been an *authoritative* resolution of the statute's validity by the highest court of the state whose statute is subject to challenge. Such a requirement would not only permit of authoritative state law construction of the statute, thereby avoiding needless constitutional adjudication, but would also comport with the policy reflected in the laws of many states requiring the state's attorney general to be notified of, and permitted an opportunity to intervene in, a case involving constitutional challenge to one of that state's laws. Compare *Young v. Masci, supra* with N.Y. C.P.L.R. §1012(b).

[3]The issue in *Balzac* was not whether "an enactment by the territorial legislature was a 'statute of [a] state' for purposes of the federal review statute" (Gov't Br. at 21 n. 7), for that issue had

Columbia v. Thompson Co., 346 U.S. 100.[4] Under the principle of statutory construction adopted in *Balzac*, this case is properly here on appeal.

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already been foreclosed by *Miners' Bank v. Iowa*, 12 How. 1. Instead, the issue in *Balzac*—and the issue presented here—was the "manifest purpose" of Congress reflected in a statute providing that review of final decisions of a court exercising "local" jurisdiction would thereafter be available in this Court as if the case were brought here from the highest court of a state. *Balzac v. Porto Rico, supra*, 258 U.S. at 302. Resolution of that issue most assuredly did not require a holding that Puerto Rico was thereafter to be considered a "state" for all jurisdictional purposes. Compare *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n. 1 with *District of Columbia v. Carter*, No. 71-564, decided January 10, 1973, slip op. at 2-3. Similarly, our argument based upon statutory construction and Congressional intent reflected in 28 U.S.C. §1257 on this branch of the case has nothing whatever to do with the constitutional definition of a "law of the United States" within the meaning of Article III. Compare *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-531.

[4]The Government's effort to distinguish *Balzac* on such grounds overlooks the fact that a "statute of [a] state" within the meaning of Section 1257(2) includes not only formal enactments of the legislature, but a host of other official promulgations which have the effect of law. *E.g., Poulos v. New Hampshire*, 345 U.S. 395, 402 (municipal ordinance); *Live Oak Association v. Railroad Commission*, 269 U.S. 354 (commission regulation). See generally, *Lathrop v. Donohue*, 367 U.S. 820, 825. Under the Government's construction of *Balzac*, statutes applicable exclusively to the District of Columbia which were enacted by the Congress would not be subject to appeal under Section 1257(2), whereas such statutes enacted by one of the local legislatures that have sat in the past in the District of Columbia, together with other official acts of local officials, would be subject to appeal. Nothing in the legislative history is cited in support of this odd construction, and no principle of statutory construction of which we are aware will support such a confusing distinction.

II.

Seemingly conceding that Article III's good behavior tenure and associated constitutional restrictions against impingement of the independence of the federal judiciary are "essential safeguard[s]"[5] and "basic constitutional protections designed in part for the protection of litigants,"[6] the Government no longer presses its earlier contention that appellant lacks standing to challenge the non-Article III status of the court that heard his case.[7] Instead, the Government now argues that Congress may deprive litigants of these basic constitutional protections and safeguards by the simple expedient of creating a federal "legislative court" to decide their cases. Putting aside its refutation of arguments we do not make,[8] the Government's position reduces to three propositions: (1) Article III imposes no restriction on the class of case which Congress may commit to non-Article III federal tribunals for adjudication (Gov't Br. at 26-38); (2) the plenary legislative power of Congress with respect to the District of Columbia permits it to vest jurisdiction over all "local" matters including "local" felonies in non-Article III courts (Gov't Br. at 38-48); and (3) the

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[5] *O'Donoghue v. United States*, 289 U.S. 516, 533 ("essential safeguard"), 540 ("right" and "guaranty"). Hamilton, *The Federalist* No. 78.

[6] *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (opinion of Harlan, J.); *Evans v. Gore*, 253 U.S. 245, 253.

[7] Motion to Dismiss or Affirm at 6 n.4.

[8] We do not contend that "Congress must confer all of the potential jurisdiction to which the 'judicial Power of the United States extends' on national courts created under Article III" nor do we argue "that any court entertaining or adjudicating a case arising under the laws of the United States must be exercising the judicial power of the United States" (Gov't Br. at 26).

"implications" of our contrary position have not been "discussed" (Gov't Br. at 27). We reply *seriatim*.

1. The Government's Article III Argument

Relying on the supposed power of Congress to require state courts to hear and determine federal criminal cases (Gov't Br. at 25-30) and the federal "legislative courts" (Gov't Br. at 30-38), the Government argues that there is no class of case which, if tried by a federal tribunal, must be heard and determined by a constitutional court. Analysis of the reasons advanced in support of this extraordinary proposition demonstrate that they do not support the Government's thesis.

a. *The State Court Argument.* Even on the *arguendo* assumption that Congress, by virtue of the Supremacy Clause of the Constitution (Art. VI, §2), could require state courts to hear and determine all criminal cases arising under the laws of the United States,[9] it does not

[9] Although it is true that early Congresses purported to confer jurisdiction upon state courts to enforce federal criminal laws, state courts balked at doing so. Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes*, 60 Harv. L. Rev. 966, 967-968 (1947). As early as 1816, Mr. Justice Story, writing for the Court, declared: "No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals." *Martin v. Hunter's Lessee*, 1 Wheat. 304, 337. (The quoted portion of the Court's opinion is probably dictum, although this Court later referred to it as an "express holding." *Houston v. Moore*, 5 Wheat. 1, 69). In 1846, relying on the international law notion that one sovereign does not enforce the penal laws of another, this Court held that Congress could not compel a state court to hear a federal criminal case. *Prigg v. Pennsylvania*, 16 Pet. 539, 615. See also, *Fox v. Ohio*, 5 How. 410, 438. While *Testa v. Katt*, 330 U.S. 386, did indeed abandon the penal law concept which undergirds *Prigg*, that case did not involve

at all follow that Congress is thereby free of the command of Article III when it provides that such cases shall be heard in federal tribunals. When a state court hears a case arising under federal law, the court is exercising the judicial power of the state, not that of the United States. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 220-223; *Mondou v. New York, N.H. & H.R. Co. (Second Employers' Liability Cases)*, 223 U.S. 1, 55-57; *Williams v. United States*, 289 U.S. 553, 566 n.1; *Ward v. Jenkins*, 10 Metc. (Mass.) 583, 589 (1846).[10] By its terms, Article III is a limitation on the exercise of federal, not state, judicial power, and it is thus wholly irrelevant that today most states do not provide life tenure for their judges.[11]

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the question whether Congress could compel state courts to adjudicate federal criminal cases nor, of course, did *Prigg* or *Testa* pursue the difficult constitutional questions which would arise if Congress ever attempted to do so. See *infra*, pp. 7-8.

[10] The commentators have recognized this fundamental principle. Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545, 596-597 (1925); Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes*, 60 Harv. L. Rev. 966, 973 n.62 (1947). See also, Doub and Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality*, 107 U. Pa. L. Rev. 443, 463 n.102 (1959).

[11] At the time the federal constitution was adopted, most state court judges held their office during good behavior. See Haynes, *Selection and Tenure of Judges* 80-135 (1944); Doub and Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality*, 107 U. Pa. L. Rev. 443, 456-458 (1959); Nelson, *Variations on a Theme–Selection and Tenure of Judges*, 36 So. Cal. L. Rev. 4, 14 (1962); Elliott, *Judicial Selection and Tenure*, 3 Wayne L. Rev. 175 (1957). Justice Traynor has developed the history which prompted many states, beginning in about 1830, to amend their constitutions and revise the good behavior tenure of their judges, and he observed that "[o]nly the difficulty of amending the Constitution saved the federal judi-

Moreover, the logical extension of the Government's state court argument demonstrates its fallacy. When tried in a federal court, including a federal court sitting in the District of Columbia to hear a "local" criminal case, a defendant is entitled to insist that the proceeding be commenced by a grand jury indictment in accordance with the Fifth Amendment. *United States v. Moreland*, 258 U.S. 433. This Court has held that a defendant appearing before a state court enjoys no such right. *Hurtado v. California*, 110 U.S. 516. When tried in a federal court, including a federal court sitting in the District of Columbia to hear a "local" criminal case, the defendant is entitled to insist upon trial by jury in accordance with the command both of Article III, §2 and the Sixth Amendment. *District of Columbia v. Colts*, 282 U.S. 63, 74; *District of Columbia v. Clawans*, 300 U.S. 617; *Callan v. Wilson*, 127 U.S. 540. This Court has held that a defendant in a state court enjoys no such Article III and Sixth Amendment right to jury trial. *Johnson v. Louisiana*, 406 U.S. 356; *Apodaca v. Oregon*, 406 U.S. 404; *Duncan v. Louisiana*, 391 U.S. 145; *Williams v. Florida*, 399 U.S. 78. Surely, the Government would not seriously maintain that a defendant before a federal court, even one sitting in the District of Columbia to hear a "local" criminal case, could be stripped of his right to grand jury indictment and trial by jury in accordance with Article III and the Sixth Amendment simply because a state court might not have to afford those important rights to litigants before it.[12] The

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ciary" from similar tenure amendments. Traynor, *Who Can Best Judge The Judges*, 53 Va. L. Rev. 1266, 1276 (1967).

[12] The Government has assumed that were Congress to vest federal criminal jurisdiction in state courts, none of the constitutional protections afforded litigants in federal courts would apply.

Government has advanced no reason, and we perceive none, to place the important safeguards afforded litigants by Article III judges on any different footing.[13]

b. *The Judicial Power Argument.* The Government contends that there is no class of case which Congress may not constitutionally commit to a federal "legislative court" sitting either in the states or the District of Columbia for final disposition (Gov't Br. at 35-38). It supports this extraordinary proposition by contending that "legislative courts" exercise "judicial power" and it places principal reliance on this Court's opinion in *Williams v. United States*, 289 U.S. 553 (Gov't Br. at 36), and on Professors Hart and Wechsler's treatise (Gov't Br. at 37).[14]

That is a dubious proposition in view of cases such as *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 524; *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 363; and *Ellis v. Union P.R. Co.*, 329 U.S. 649, 653. See generally, *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 360. It will be time enough to deal with those difficult constitutional questions which would arise under the Government's theory if Congress ever passes the hypothetical legislation upon which its argument rests. At such a time, with respect to the issue advanced in this case, it might be relevant that state court judges are not subject to salary reduction, discipline, non-reappointment, or removal by either the federal executive or the federal legislature.

[13] It serves to highlight the inapplicability of the Government's state court argument to recall that the District of Columbia is the one place in the permanent federal union where Congress could not call upon state judicial power to enforce federal criminal law.

[14] The Government's reliance on *In re Ross*, 140 U.S. 453 (Gov't Br. at 34, 36), is difficult to understand in view of *Reid v. Covert*, 354 U.S. 1, 10-12 (opinion of Black, J.), 50, 56-64 (Frankfurter, J., concurring), 74-78 (Harlan, J., concurring). Reliance on the territorial court cases (Gov't Br. at 34-36) is foreclosed. *District of Columbia v. Carter*, No. 71-564, decided

To return the argument to proper focus, we reproduce in full the quotation which the Government has selectively excerpted in its brief (Gov't Br. at 37):

> "It must be concluded, must it not, that at least in a qualitative sense legislative courts exercise 'judicial power'? As Justice Sutherland said in Williams (289 U.S. at 567), 'If the power exercised by legislative courts is not judicial power, what is it? Certainly it is not legislative, or executive, or administrative power, or any imaginable combination thereof.' But he added (p. 565) that 'the question still remains—and it is the vital question—whether it is the judicial power defined by Art. III of the Constitution'." Hart & Wechsler, *The Federal Courts and the Federal System* 348 (1947).

Elsewhere, the authors focused on the very issue presented by this case:

> "Q. Does the Constitution give people any right to proceed or be proceeded against, in the first instance, in an inferior federal constitutional court rather than a federal legislative court?
>
> "A. *As to criminal defendants charged with offenses committed in one of the states, surely.* As to others, it's hard to say. The answer may well vary for civil plaintiffs and civil defendants. And it must vary, must it not, according to the nature of the right in question and the availability and scope of review in a constitutional court?" Hart & Wechsler, *supra*, at 313 (emphasis added).

January 10, 1973, slip op. at 13 n.28; *Glidden Co. v. Zdanok*, 370 U.S. 530, 544-548 (opinion of Harlan, J.); *Reid v. Covert*, 354 U.S. 1, 50-54 (Frankfurter, J., concurring), 74-76 (Harlan, J., concurring); *O'Donoghue v. United States*, 289 U.S. 516.

The issue presed by appellant is not properly resolved by affixing a label to the power exercised by "legislative courts"—whether that label be "judicial power" in the generic, but not constitutional, sense,[15] or some other governmental power[16]—but instead by an examination of the nature of the matter committed to the legislative tribunal for adjudication. *Glidden Co. v. Zdanok*, 370 U.S. 530, 549-550 (opinion of Harlan, J.), 600-601 (Douglas, J., dissenting); *Crowell v. Benson*, 285 U.S. 22, 50; *Williams v. United States*, 289 U.S. 553, 569, 579-580; *Ex parte Bakelite Corp.*, 279 U.S. 438, 453; *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 280, 284.

Most frequently, this Court has expressed the issue by distinguishing between matters which "require" exercise of Article III's judicial power and those which merely permit of, but do not require, exercise of that power.[17] Other views have also been advanced. For example, Mr. Justice Brandeis has suggested that "due process" considerations determine the limit of the legislature's power

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[15] *E.g.*, *Williams v. United States*, 289 U.S. 553, 566.

[16] *E.g.*, *Ex parte Bakelite Corp.*, 279 U.S. 438, 449, 451, 453.

[17] *E.g.*, *Williams v. United States*, 289 U.S. 553, 579-580; *Ex parte Bakelite Corp.*, 279 U.S. 438, 453. As Professor, later Mr. Justice, Frankfurter has painstakenly demonstrated, the term "judicial power" requires resort to history in order to impart meaning to the constitutional phrase. Frankfurter and Landis, "*Power of Congress Over Procedure in Criminal Contempts in 'Inferior Federal Courts'—A Study in Separation of Powers*," 37 Harv. L. Rev. 1010, 1016-1023 (1924). In this regard, it is highly significant that the Judiciary Act of 1789, as well as the Organic Act of 1801, established constitutional courts to hear and determine serious criminal matters prosecuted by the federal authorities before federal tribunals. See Br. at 33-36.

to provide for adjudication of certain classes of cases in federal tribunals other than the constitutional courts.[18] More recently, Mr. Justice Douglas has said: "it does not advance analysis by calling the function a 'judicial' one * * *, for both Article I courts and Article III courts perform functions of that character. The crucial question on this phase of the problem is the manner in which that judicial power is to be exercised."[19] But, whatever the focus of the analysis, the result in this case is the same: a serious criminal case cannot be committed to a federal tribunal other than a constitutional court. *E.g., Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 475, 485-488; *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 76-77 (Brandeis, J., dissenting); *Glidden Co. v. Zdanok*, 370 U.S. 530, 601 (Douglas, J., dissenting). Accord: *O'Callahan v. Parker*, 395 U.S. 258, 264; *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17-18; *Callan v. Wilson*, 127 U.S. 540, 556-557. Concededly, no case in this Court's jurisprudence squarely so holds but that, we submit, is simply because Congress has never before

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[18] *Crowell v. Benson*, 285 U.S. 22, 86-87 (dissenting opinion); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 77 (concurring opinion). As Justices Stone and Cardozo pointed out, the due process view of Mr. Justice Brandeis runs counter to the "weight of precedent that has now accumulated against it." 298 U.S. at 93 (concurring opinion). We understand Justice Brandeis' "due process" test to be merely a gauge by which those matters which must be adjudicated in a constitutional court may be identified. Given a matter such as the felony involved in this case, we read Justice Brandeis' concurrence in the Court's opinion in *O'Donoghue v. United States*, 289 U.S. 516, as assent to the view that Article III's safeguards are infringed when such a matter is committed to a non-constitutional "court" for adjudication.

[19] *Glidden Co. v. Zdanok*, 370 U.S. 530, 598 (dissenting opinion).

attempted to deprive a federal felony defendant of Article III's safeguards and protections.

Just as contemporary constitutional history has fleshed out the meaning of Article III's command that "trial of all crimes, except in cases of impeachment, shall be by jury,"[20] so too there is substantial historical support for the exclusion of minor criminal matters from the mandatory reach of Article III's judicial power. Doub and Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality*, 107 U. Pa. L. Rev. 443 (1959). See generally, *District of Columbia v. Clawans*, 300 U.S. 617, 624-628; *In re Kaine*, 14 How. 103, 119; cf. *Capital Traction Co. v. Hof*, 174 U.S. 1, 17. Both in the District of Columbia and in the several states, Congress has utilized non-Article III federal officers for the determination of minor criminal offenses and has authorized those officers to impose punishments not exceeding one year incarceration.[21] Whether by doing so, Congress has gone too far is not the issue presented by this case for, whatever the constitutional dividing line,[22]

[20] Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917 (1926). See *Callan v. Wilson*, 127 U.S. 540; cf. *Cheff v. Schnackenberg*, 384 U.S. 373.

[21] 18 U.S.C. §3401 now authorizes federal magistrates to try "minor" criminal cases and impose punishments not exceeding one year in prison. Under this statute, the power is exercised concurrently with Article III judges. In the District of Columbia, the justices of the peace have historically had a similar power. See Br. at 35. *But cf. United States v. More*, 3 Cranch 159 (C.C.D.C.) (Marshall, C.J. and Cranch, J.), *error dismissed*, 3 Cranch 159 (1805). See *infra*, p. 18 n.32.

[22] There is a suggestion in *Callan v. Wilson*, 127 U.S. 540, 556, that the separate class of "petty" criminal case to which we refer does not extend to "infamous crimes." See *United States v.*

it is clear that there is a separate class of minor criminal offenses which historically have been treated as distinct from the serious felony. For the Court to hold, as we urge it to do, that a felony prosecution cannot be heard and determined by any federal tribunal other than a constitutional court is surely not to hold that all criminal cases, no matter how minor, to which the judicial power of the United States might extend must be so tried. *A fortiori*, the holding which we seek has no bearing at all on the relationship of Article III to civil actions tried before federal tribunals.[23]

Moreland, 258 U.S. 433. Reviewing the historical materials in the context of Article III's jury trial proviso, this Court has fixed incarceration not exceeding six months as the constitutional limit for punishment by a judge sitting without a jury. *Cheff v. Schnackenberg*, 384 U.S. 373. Other cases suggest that the nature of the offense is of critical constitutional significance. *District of Columbia v. Clawans*, 300 U.S. 617; *Cheff v. Schnackenberg*, 384 U.S. 373, 389 (Douglas, J., dissenting).

[23] See generally, Hart & Wechsler, *The Federal Courts and the Federal System* 313-340 (1953). In dealing with civil actions, this Court has uniformly followed the principle set forth in cases such as *Williams v. United States*, 289 U.S. 553, and *Crowell v. Benson*, 285 U.S. 22, and distinguished between matters which necessarily require exercise of Article III's judicial power, and those which permit of decision in other ways. As to civil actions against the United States (and *a fortiori*, the District of Columbia), see *Glidden Co. v. Zdanok*, 370 U.S. 530; *Williams v. United States*, 289 U.S. 553. As to particular matters committed by Congress to non-Article III tribunals, see *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38; *Crowell v. Benson*, 285 U.S. 22; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49. In such cases, the eventual right of judicial review by a constitutional court, and the scope of such review, may be relevant. Schwartz, *Does the Ghost of Crowell v. Benson Still Walk?*, 98 U. Pa. L. Rev. 163 (1949). Compare *United States v. Kras*, ___ U.S. ___, 41 L.W. 4117, 4122 with *id.* at 4126 n. 5

2. The Government's District of Columbia Argument

The Government does not argue that Article III is inapplicable in the District of Columbia, seemingly agreeing that that issue is foreclosed by *O'Donoghue v. United States*, 289 U.S. 516. See also, *District of Columbia v. Carter*, No. 71-564, slip op. at 13 n.28. Instead, the Government now argues that there is a constitutional distinction between "local" and "national" matters, and that if a matter is "local," the felony defendant may be deprived of the constitutional safeguards afforded litigants by Article III's guaranties of judicial independence (Gov't Br. at 38-48). We contend that the "national"-"local" distinction should not control decision in this case for three separate reasons: (1) this Court has never before recognized the "local" nature of an offense or cause of action as a reason to deprive litigants of important constitutional safeguards, and those who wrote Article III did not contemplate any such distinction; (2) the District of Columbia is "national" not "local"; and (3) the distinction for which the Government contends, if accepted, will be the breeding ground of much constitutional litigation both in the District of Columbia and elsewhere.

(Marshall, J., dissenting). As to civil actions involving "suits at common law," see *Capital Traction Co. v. Hof*, 174 U.S. 1. Contrary to the Government's reading of the case (Gov't Br. at 38-39), *Capital Traction* holds that the Seventh Amendment is violated when such a civil action is tried before a non-Article III officer, sitting with a "jury," unless there is a right to trial *de novo* before a constitutional court sitting with a constitutional jury. 174 U.S. at 17-18, 45-46. (Another facet of the *Capital Traction* holding involving the Seventh Amendment's requirement of a twelve-member jury is presently pending *sub judice* before the Court. *Colgrove v. Batten*, No. 71-1442, argued January 17, 1973).

First, this Court has never accepted the "local" nature of a particular criminal offense or civil action as a reason for depriving a litigant before the federal courts sitting in the District of Columbia of any of the constitutional rights and safeguards pertaining to the manner in which the federal judicial power is to be invoked and exercised. The leading cases dealing with the applicability in the District of Columbia of Article III's right to trial by jury,[24] the Fifth Amendment's guarantee of a grand jury indictment,[25] the Sixth Amendment's right to trial by jury,[26] and the Seventh Amendment's similar right in a civil action[27] were all "local" cases. The only constitutional right yet to be held applicable to the District of Columbia is the safeguard afforded litigants by Article III's guarantee of judicial independence.[28] It is abundantly clear that those who wrote Article III contem-

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[24] *District of Columbia v. Colts*, 282 U.S. 63, 74; *District of Columbia v. Clawans*, 300 U.S. 617, 624; *Callan v. Wilson*, 127 U.S. 540, 547.

[25] *United States v. Moreland*, 258 U.S. 433.

[26] *District of Columbia v. Clawans*, 300 U.S. 617; *Callan v. Wilson*, 127 U.S. 540.

[27] *Capital Traction Co. v. Hof*, 174 U.S. 1.

[28] In *O'Donoghue v. United States*, 289 U.S. 516, 540, this Court emphatically rejected the notion that persons whose cases are heard and determined by the federal courts sitting in the District of Columbia were to be deprived of "the guaranty of an independent judiciary * * *." In *Lurk v. United States*, the companion case to *Glidden Co. v. Zdanok*, 370 U.S. 530, this Court issued a writ of certiorari to consider whether a defendant charged with a "local" offense was deprived of this guaranty when tried before a judge, sitting by designation, then thought not to enjoy Article III independence. Decision of the issue presented here was rendered unnecessary in view of the Court's conclusion that Lurk had been tried by an Article III judge.

plated that it would protect litigants without regard to the "local" nature of the matter before the federal court:

> "This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those of ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. * * *
>
> *But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws.* Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the legislative body in passing them * * *." Hamilton, *The Federalist No. 79* at 487-488 (Lodge ed. 1888) (Emphasis added.)

Second, the District of Columbia is not "local" but "national." *O'Donoghue v. United States*, 289 U.S. 516, 539; *Callan v. Wilson*, 127 U.S. 540, 550. In constitutional theory, citizens of the several states have the right to travel to the District of Columbia to seek redress from the several branches of the national government. *Crandall v. Nevada*, 6 Wall. 35, 43. In contemporary times, the nation's capital is visited daily by tens of thousands of

people who do not reside here: tourists from every state, businessmen meeting with important government officials, foreign visitors and diplomats, lawyers and litigants with matters pending before this Court or one of the other important federal courts and administrative agencies which sit in the District of Columbia, and those who live in nearby states and travel to the federal city for work, study or recreation. Indeed, appellant, who resided in Maryland,[29] was exercising his right to come to the District of Columbia when he was arrested and charged with a felony. We fail to perceive how appellant, or any of the other people who daily come to the District of Columbia, in the exercise of one constitutional right can be found to forfeit another. We find it equally difficult to understand why appellant could have demanded the safeguards afforded by Section 2 of Article III[30] but not those afforded by Section 1 of Article III.

To say that the District of Columbia is "national" in one sense, is not to deny the plenary legislative power of Congress over a host of "local" matters pursuant to the grant of plenary legislative power contained in Article I, §8, cl. 17. *District of Columbia v. Thompson Co.*, 346 U.S. 100. Nor, of course, does our argument have any bearing on "home rule" proposals (Gov't Br. at 43).[31] We

[29] Supplemental Transcript at p. 4. (The supplemental transcript is in the record on appeal, but is not reproduced in the printed appendix.)

[30] *District of Columbia v. Colts*, 282 U.S. 63, 74.

[31] The District of Columbia has had various forms of "home rule" government before. *District of Columbia v. Thompson Co.*, 346 U.S. 100. If Congress wishes to do so, there is nothing in the Constitution which would prevent Congress from authorizing the appointment of federal judges in the District of Columbia "in the President alone, in the courts of law, or in the heads of departments." Article II, §2, cl. 2. But just as a local legislature

merely emphasize what this Court has repeatedly held: that the plenary "local" legislative power which Congress enjoys with respect to the District of Columbia is subject, like every other legislative power, to the commands and prohibitions of the Constitution. *District of Columbia v. Thompson Co.*, 346 U.S. 100, 109; *O'Donoghue v. United States*, 289 U.S. 516, 545.[32]

Third, the "local" distinction for which the Government contends is one which is not applicable only to the District of Columbia, but it is a distinction which, if adopted, will lead to much difficult constitutional litigation. Federal criminal statutes run the gamut insofar as their constitutional bases are concerned. Some federal crimes turn on the federal status of the actor,[33] others on the federal status of the victim.[34] Some federal crimes

could not deprive litigants of trial by jury, or grand jury indictment, we submit that such delegated legislative power would not permit a "home rule" legislature to deprive litigants of their constitutional safeguard of judicial independence.

[32] The status of the District of Columbia as a municipal corporation may have additional bearing on the relationship of Article III with respect to minor criminal matters. Doub and Kestenbaum, *Federal Magistrates for The Trial of Petty Offenses: Need and Constitutionality*, 107 U. Pa. L. Rev. 443, 458 n.74, 464 n.104 (1959). See *Capital Traction Co. v. Hof*, 174 U.S. 1, 17.

[33] *E.g.*, 18 U.S.C. §201, the federal bribery statute which includes "officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia."

[34] *E.g.*, 18 U.S.C. §1114, the federal statute which provides punishment for the murder of important federal officials including "a judge of the United States, any United States Attorney * * * [or] any employee of the Department of Agriculture designated * * * to carry out any law or regulation, or to perform any function in connection with * * * any program of * * * the District of Columbia * * *."

turn on the federal situs of the prohibited conduct,[35] others on the use of commerce to effectuate the prohibited conduct.[36] With respect to the District of Columbia, some crimes based on the legislative power contained in Article I, §8, cl. 17 are found in the District of Columbia Code,[37] while others are in the United States Code.[38] Mere separation of the "local" from the "national" is a difficult enough problem.

Frequently, the same conduct gives rise to a variety of potential criminal charges. The problems which accompany prosecutorial discretion to select from among several criminal statutes the one under which defendant will be prosecuted is a difficult enough problem[39] without adding to the consequences of the prosecutor's choice a deprivation of the constitutional safeguard of judicial independence. Several examples will suffice to make the point. One who murders an important federal official has violated a federal statute of nationwide applicability, 18 U.S.C. §§1114, 1751, and if charged under that statute would be entitled to an Article III court sitting in the District of Columbia. 11 D.C. Code §502; 18 U.S.C. §3231. Under the Government's proposed "local" test, however, that same defendant can be deprived of the safeguards of Article III's guaranty of judicial independence by the mere selection of a different statute, 22 D.C. Code §2401, on which to base the

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[35] *E.g.*, 18 U.S.C. §§7, 13.

[36] *E.g.*, 18 U.S.C. §§1074, 1952.

[37] See generally, Title 22, District of Columbia Code.

[38] See, *e.g.*, 15 U.S.C. §3. *United States v. National Association of Real Estate Boards*, 339 U.S. 485.

[39] See, *e.g.*, *Berra v. United States*, 351 U.S. 131; *Newman v. United States*, 127 U.S. App. D.C. 263, 382 F.2d 479 (1967).

prosecution. On the day-to-day level, the same is true of those many prosecutions involving narcotic drugs.[40] Indeed, in this very case appellant would have enjoyed Article III safeguards had the Government instituted its prosecution under 18 U.S.C. App. §1202(a).[41]

While we have not grounded our claim in this case on due process-equal protection grounds, future defendants will surely do so if the Government's "national"-"local" distinction be adopted. We think that the appropriate constitutional inquiry is the serious nature of any federal felony prosecution, and the substantial consequences which those convicted of such crimes face, and not the source of the legislative power which Congress exercised in proscribing the particular conduct in issue.

3. The Government's "Implications" Suggestion

The Government suggests that we have failed to discuss the "implications" of our contention that a felony prosecution, if tried in a federal court, must be before an Article III judge (Gov't Br. at 27). In our opening brief, we had assumed that such "implications" would await a

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[40] Compare 26 U.S.C. §§4704(a), 4723 with 33 D.C. Code §402.

[41] Appellant has previously been convicted of a felony (A. 3). On the evening of his arrest, appellant, a Maryland resident, was arrested while driving a rented automobile with Virginia license plates in the District of Columbia (A. 12-13; see *supra*, p. 17 n.29). Other testimony established that appellant was coming to the District of Columbia for a dinner engagement with friends (Supplemental Transcript, pp. 35-36) when he was selected for a "spot check" during which the police officers testified they discovered a gun (A. 12-18). See *United States v. Bass*, 404 U.S. 336, 350-351.

future case (Br. at 46 n.64). In view of the Government's point, however, it is appropriate to respond briefly even though we submit that "implications" are irrelevant to the disposition of the issue before the Court.[42]

If the Court should hold, as we ask it to do, that appellant was entitled to have his case heard and determined by an Article III court, it must be assumed that others would seek to apply that holding retroactively either to overturn otherwise final judgments, or to raise on appeal an issue that was not raised in the trial court. It must also be assumed that defendants awaiting trial on felony indictments pending in the Superior Court would demand Article III courts for the disposition of their cases. The "implications" of the holding we seek, either retroactively or prospectively, are not overly grave.

Those who seek to retroactively apply such a ruling would face a steep obstacle to success in view of the fact that the Court Reform Act contains an express provision permitting the designation of Article III judges to preside over trials in the Superior Court. 11 D.C. Code §908(c). In the face of such a strong reason for requiring a pre-trial objection, it may well be that this Court's holdings in

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[42] The Government has successfully argued that only those convicted by a non-Article III court have standing to raise the issue presently posed. *Bradford v. Greene*, 142 U.S. App. D.C. 237, 440 F.2d 265 (1971). In view of the requirement of a final judgment as a prerequisite for review in this Court, 28 U.S.C. §1257, this case could not have been brought here sooner. With the exception of a few additional days to prepare pre-trial motions in the Superior Court (A. 1), appellant has not sought a single extension of procedural time limits for the presentation of briefs. If, as the Government seems to suggest, "implications" have any bearing on this case, no litigant can ever gain appropriate review and redress for a claimed deprivation of Article III safeguards.

cases such as *McDowell v. United States*, 159 U.S. 596, 601-602 and *Ball v. United States*, 140 U.S. 118, would end the matter.[43] Even if, as this Court held in *Glidden Co. v. Zdanok*, 370 U.S. 530, 536, the right at issue here is so "basic" as to warrant correction on direct appeal without the usual requirement of a trial court objection, the number of persons affected is not great. During 1971,[44] the Superior Court disposed of the felony cases of 1,096 persons. Of these, 778 entered a plea of guilty and their convictions quickly became final. The remaining 318 defendants went to trial and, while information on the number actually convicted is not available, it is known that the District of Columbia Court of Appeals was "current" at the end of 1971 and setting appeals for argument within thirty days from the time the last brief was filed. Annual Report of the District of Columbia Courts, pp. 2, A-3 (1971). Thus, only a relatively few of the many felony defendants whose cases have come before the Superior Court go to trial, and, of these, fewer still have their convictions pending on appeal at any given time.

By the same token, the designation provisions of 11 D.C. Code §908(c) permits Article III judges to sit in the Superior Court during the short interim period it would take Congress to enact corrective legislation if appellant were to prevail. In short, while there are substantial constitutional rights at stake in this case, there are no dire "implications" to thwart vindication of those rights.

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[43] See also the arguments advanced by the Government in *Warner v. Flemings*, No. 71-1398, and *Gosa v. Mayden*, No. 71-6314, now pending *sub judice* before the Court.

[44] We are informed that the 1972 Annual Report will shortly be issued and will contain the corresponding information for the calendar year ending December 31, 1972.

III.

In response to the Government's Fourth Amendment argument (Gov't Br. at 49-56), we make three points:

1. The police conduct which the Government says is "so routine that no indignity or affront can be inferred" (Gov't Br. at 54) consisted of the actions of four plain clothes officers in two unmarked police cars who forced appellant to the side of the road so that one officer could inspect appellant's license and registration credentials, another could observe with the aid of his flashlight "everything that might be inside the car" (A. 37), and the remaining two officers could "assist" (A. 29). All of this was done pursuant to a policy of making "spot checks" and recording on informal forms personal data regarding the driver and all occupants which are turned in to the special operations division (A. 36). Indeed, directly contrary to the Government's assertion, the police officer who decided to make this particular stop flatly testified that "I don't know what a routine traffic check is" (A. 29).

2. The Government's reliance on *United States v. Biswell*, 406 U.S. 311, is surprising. In this case, as contrasted with *Biswell*, Congress has not authorized the police to stop automobiles as the method of enforcing driver's license and registration laws. Compare 18 U.S.C. §923(g) with 40 D.C. Code §§104(a), 301(c). Moreover, to equate the "justifiable expectation of privacy" of a dealer in firearms with that of a motorist who has violated no law or ordinance is to ignore the realities of contemporary urban life.

3. The suggestion that the permissibility of particular regulatory legislation insulates from Fourth Amendment scrutiny the means of insuring compliance (Gov't Br. at

52-55) runs directly afoul of the repeated holdings of this Court. *E.g., United States v. Biswell*, 406 U.S. 311; *Colonnade Catering Corp. v. United States*, 397 U.S. 72; *See v. City of Seattle*, 387 U.S. 541. The suggestion that the unannounced inspection of a firearms' dealer pursuant to explicit statutory authority upheld in *Biswell* authorizes individual police officers, each for his own reasons (A. 21), to stop motorists at will without statutory authority is startling. Cf. *United States v. Lopez*, 328 F. Supp. 1077 (E.D. N.Y. 1971).

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-11

ROOSEVELT F. PALMORE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE DISTRICT
OF COLUMBIA COURT OF APPEALS

SUPPLEMENTAL BRIEF FOR APPELLANT

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SUPPLEMENTAL BRIEF FOR APPELLANT

Pursuant to Rule 41(5) of the Rules of this Court, appellant tenders this supplemental brief for the sole purpose of calling to the Court's attention a late authority which was not generally available when the parties prepared their respective briefs.*

*The late authority is Hart and Wechsler, *The Federal Courts and the Federal System* (2nd ed. 1973), which was revised by Professors Paul M. Bator and David L. Shapiro of Harvard University, Professor Paul J. Mishkin of the University of Pennsylvania, and Professor Herbert Wechsler of Columbia University. This work, although published in January, 1973, was not generally available when the briefs of the parties were prepared. We have tendered a copy of this new edition to the Solicitor General for his perusal prior to the argument of this case.

Both the Government (Gov't Br. at 28, 29, 37) and appellant (Reply Br. at 8-9) have relied on the 1953 edition of Professor Hart and Wechsler's treatise, and particularly the "Note on Legislative Courts" set forth therein. A new second edition of this treatise has now been published which differs in material respects from the edition on which the parties relied. The new edition omits the quotation to which the Government has referred (Gov't Br. at 37) and has added the following comment on the issue raised by this case:

> "Do criminal prosecutions by the federal government present a special case? (Recall the special mention of such cases in Article III itself.) Note that Congress could presumably have such cases tried in the state courts (at least if it chose not to create federal trial courts); note, too, that the territorial courts exercised criminal as well as civil jurisdiction. Nevertheless, legislation assigning the trial of federal criminal cases, prosecuted within the United States, to federal tribunals unprotected by the guarantees of Article III could not be justified today, could it? Review, in this connection, the cases discussed in the *Note on Court Martial Jurisdiction*, p. 372, *supra*. The language in some of them—notably Toth and O'Callahan—clearly suggest that the Court will view with the highest disfavor any attempt to encroach on the jurisdiction of the Article III courts over federal criminal cases.
>
> Military courts martial are, of course, themselves a very special case: they are tribunals (as is the Court of Military Appeals) created pursuant to the explicit authority in Article I to "make Rules for the Government and Regulation of the land and naval Forces."

What about prosecutions brought by the federal government to try Americans for offenses against American law committed abroad: could Congress create civilian legislative courts to hear such cases? (Recall that the cases discussed in the *Note on Court Martial Jurisdiction* all involved *military* tribunals). Compare Madsen v. Kinsella, 343 U.S. 341 (1952), upholding the power of the President as commander-in-chief to establish the United States Courts of the Allied High Commission for Germany for the trial of nonmilitary crimes by American citizens and others; *cf.* Rose v. McNamara, 375 F.2d 924 (D.C. Cir. 1967) (relating to a conviction in Okinawa)."

Hart and Wechsler, *The Federal Courts and The Federal System* 397 (2nd ed., 1973).

Respectfully submitted,

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February 16, 1973